

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



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76-1113

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**United States Court of Appeals  
For the Second Circuit**

Docket Numbers  
76-1113, 1124, 1127, 1148

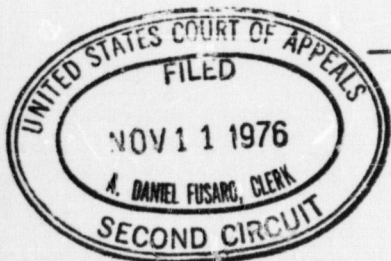
UNITED STATES OF AMERICA,  
*Appellee,*

v.

FRANCISCO ADRIANO ARMEDO-SARMIENTO,  
\*\*\*, LEON VELEZ, \*\*\*,  
*Appellants.*

*On Appeal From the United States District Court  
For the Southern District of New York*

PETITION ON BEHALF OF APPELLANT LEON  
VELEZ FOR REHEARING WITH A  
SUGGESTION FOR REHEARING EN BANC OR  
IN THE ALTERNATIVE FOR THE ISSUANCE  
OF AN ORDER STAYING THE MANDATE OF  
THIS COURT AND CONTINUING THE  
APPELLANT ON BAIL PENDING APPLICATION  
FOR CERTIORARI TO THE SUPREME COURT  
OF THE UNITED STATES



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

-against-

FRANCISCO ADRIANO ARMEDO -  
SARMIENTO, \*\*\*, LEON VELEZ, \*\*\*,

Appellants.

Docket Numbers

76-1113, 1119, 1124,  
1127, 1148

-----X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

PETITION ON BEHALF OF APPELLANT LEON  
VELEZ FOR REHEARING OR IN THE ALTERNA -  
TIVE FOR THE ISSUANCE OF AN ORDER STAY -  
ING THE MANDATE OF THIS COURT AND  
CONTINUING THE APPELLANT ON BAIL PENDING  
APPLICATION FOR CERTIORARI TO THE SUPREME  
COURT OF THE UNITED STATES

To The United States Court of Appeals For The Second Circuit:

LEON VELEZ, one of the appellants above named,  
respectfully petitions this Honorable Court for a rehearing of the  
appeal in the above -entitled case and in support of this petition  
represents to the Court as follows:

The appellant reserves his argued position as to each  
of the points heretofore raised on appeal, but in this petition addresses  
himself solely to those aspects of the opinion of this Court, decided  
October 28, 1976, wherein the Court may be convinced that its result



is based on the misapprehension of certain matters pertaining to the issues originally raised on appeal.

Therefore, this petition respectfully seeks to convince the Court that it has erred in its determination with respect to the following stated issues:

First, the finding by this Court that the repetitive improper remarks made by the prosecutor, both in opening and in summation (39 instances) were not "so prejudicially improper as to deprive appellants of a fair trial" (S.O. 316)\* was in error in that it failed to take into consideration the impact upon the jury created by the vast number of instances involved.

Second, the failure to the Trial Court to impose any sanctions upon the prosecutor for his misconduct in improperly addressing the jury in his opening and summations is of Constitutional dimension in that it denied the defendants of the due process of law guaranteed them by the Fifth Amendment of the Constitution of the United States of America.

If the instant petition for rehearing is denied, the appellant VELEZ respectfully petitions this Court for the issuance of an order staying the mandate of this Court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

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\*Numbers preceded by the letters "S.O." refer to pages of the Slip Opinion.

As To A Rehearing Of The Limited Aspects Of This Appeal

I.

The continuous and repetitive improper remarks made by the prosecutor, both in opening and in summation, deprived the defendants of a fair trial and was in contradiction of the "Standards Relating to The Prosecution Function" established by the American Bar Association. This, coupled with the failure of the Trial Court to impose any sanctions upon the prosecutor, denied the appellant VELEZ and his co-appellants the Due Process of Law guaranteed each of them by the Fifth Amendment of the Constitution of the United States and was of Constitutional dimension

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It is respectfully submitted that this Honorable Court was in error when by its opinion it brushed off as inconsequential Point III of the Brief of appellant Velez, regarding the prejudicial remarks made by the prosecutor in both his opening and his summations.

The finding of this Honorable Court that these remarks are the natural consequences "of a lengthy, multi-defendant trial \*\*\* which would not be selected for a manual on trial procedure" (S.O. 316) and that "no comments by the prosecutor were so prejudicially improper as to deprive appellants of a fair trial" (S.O. 316) ignores the holdings of this Court in United States v. Drummond, 481 F. 2d 62, 64 (2nd Cir. 1973), in which this Honorable Court said:

"We need not decide any single one of the acts of prosecutorial misconduct would require us to reverse this conviction and remand this case to the busy Eastern District for a third trial. But the combination of them leaves us no other course." (481 F. 2d 62, 64) [Emphasis supplied.]



In Drummond, supra, as in this case, the Trial Judge repeatedly admonished the prosecutor not to continue his improper tactics but did nothing further.

Likewise, in United States v. Bivona, 487 F. 2d 443 (2nd Cir. 1973), this Honorable Court held that a verbal spanking is not enough to assure fair prosecution and that where the Trial Court has not imposed any sanctions for same, reversal is the only remedy.

In the Approved Draft of the "Standards Relating to the Prosecution Function and The Defense Function," adopted by the House of Delegates of the American Bar Association at its mid-year Meeting in February, 1971, Section 5.8 reads as follows:

"5.8 Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." (p. 126)

In the instant case, the prosecutor violated each and every guideline set forth supra. Some of the more blatant incidents, which are set forth in detail under Point III of the Brief of appellant Velez (pp. 41-51), are his attempt to bolster the testimony of the co-conspirators Carmen Caban, Billy Andries, Leonel Fernandez and Rita Ramos, by expressing his personal opinion that the individuals in question were telling the truth, all of this in violation of subdivision (b) of Section 5.8 of The Prosecution Function of the American Bar Association Standards, supra, which are delineated in such Standards as "unprofessional conduct." This is crystal clear when one reads the following excerpt from the prosecutor's summation:

"Put yourself in my position. If a Carmen Caban or Billy Andries or Leonel Fernandez or Rita Ramos came to you and said, 'I know who is dealing in millions of dollars worth of cocaine and marijuana. You people don't know, like Julian Carrion Arco, still going on under other names -- how do I know about it? Because I was involved.

"Do you send those people away. Do you say, 'No, no, you are a bad guy, you are a defendant; I can't talk to you; I can't talk to you because you are despicable; you are a fink; you are a bum if you do that; I can't talk to you'?"

"Or do you take that person's cooperation and say to yourself, 'I have a responsibility to determine whether or not a crime has been committed, to get evidence against the people who committed it, and then go out and find the corroboration which convinces me that in fact that person is telling the truth?'

"I think your answer would be the same in all



cases. I think you would find that that is your obligation."

. . .

"The Court: Personal beliefs should not be indulged in by either side." (T8524, 8525; pp. 46-47, Velez brief) [Emphasis supplied.]

While the opinion of this Court in the instant case properly states that a prosecutor is entitled to "stress the credibility" of the Government's witnesses and "moreover, arguments advanced by the defendant or by counsel on his behalf may be responded to by government counsel" (S.O. 317), it is respectfully submitted that the conclusion that the prosecutor's remarks in this case were substantially of the above nature and, therefore, there was no prejudicial error, failed to consider the blatant and obvious attempt by the prosecutor to inject into his argument his personal opinion of the veracity of the Government's witnesses, as appears supra.

Likewise, it is respectfully submitted that in the trial of the instant case, the prosecutor ignored the guidelines set forth in Section 5.8 of the Prosecution Function of the American Bar Association Standards, supra, in that he used arguments "calculated to inflame the passions or prejudices of the jury" and "injecting issues broader than the guilt or innocence of the accused under the controlling law." In referring to the appellant Velez, both in his opening at T 83 and his summation at T 8486, he attempted to pit the jury's earnings and personal wealth against that admitted by the appellant Velez (see pp. 48 and 49 of brief of appellant Velez). Likewise, he

he succeeded in inflaming the passions and prejudices of the Jury by specifically including them and himself as being the victims of the conspiracy alleged, stating

"All those acts which were committed were directed against the laws of the United States, they were directed specifically against the society which lives in New York City. More specifically, they were directed against you and I.

. . . .

"The Court: We will strike the latter part of the statement." (T 7958; p. 45, Velez brief) [Emphasis supplied.]

The finding of this Honorable Court, in its opinion in the instant case, that the improper remarks of the prosecutor were counteracted and declawed "because the district judge carefully limited their scope with proper precautionary instructions, we find no prejudicial error" (S.O. 317) ignores the inevitable conclusion that the frequency of the Court's admonitions to the prosecutor, followed by his flaunting and ignoring them, must have demonstrated to the Trial Jury that the District Judge "really did not think them important or bad, or he would have done something far more drastic."

Section 5.10 of the American Bar Association Standards relating to the "Function of the Trial Judge" reads as follows:

"5.10 Final argument to the jury.

The trial judge should not permit counsel during the closing argument to the jury to

(i) express his personal opinions as to the truth or falsity of any testimony or evidence or the guilt or innocence of the defendant,



(ii) make arguments on the basis of matters outside the record, unless they are matters of common public knowledge or of which the court may take judicial notice, or

(iii) make arguments calculated to inflame the passions or prejudices of the jury." (p. 73)

The Commentary points out that this Section is based on Sections 5.8 and 5.9 of the American Bar Association Standards, The Prosecution Function, and states

"The basic provisions are repeated here because of the importance of the subject, and to emphasize the trial judge's obligation to enforce these prohibitions against improper argument which carries a high potentiality for prejudice to the interests of justice." (p. 73)

The totality of the improper statements made by the prosecutor in the instant case, coupled with the ineffectiveness of any action by the District Judge, deprived the appellant Velez and his co-defendants of a fair trial and the Due Process of Law guaranteed all of them by the Fifth Amendment.

It is respectfully submitted that this Honorable Court should reconsider its finding of "no prejudicial error."

### Conclusion

As to staying the issuance of the Court's mandate and continuing the appellant on bail pending application for a Writ of Certiorari to the Supreme Court

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If this Court should deny the instant petition for a rehearing, the appellant Velez intends to present to the United States Supreme Court a petition for a writ of certiorari. It is respectfully prayed that the issuance of the mandate of this Court be stayed and the petitioner continued on bail until the determination of said petition for a Writ of Certiorari.

Appellant Velez has been continued on bail herein pending appeal in the same amount (\$100,000 surety company bond) and under the same terms and conditions as previously applied.

Appellant is a lawful resident of the United States and has resided in the United States and within the City of New York continuously for a period of upwards of 17 years. He has no prior conflict with the law, and he has always responded to the edicts of the Court and fulfilled his bail obligations.

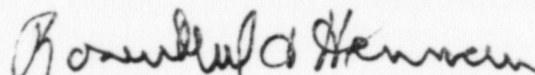
It is respectfully submitted that the questions above discussed, as well as those set forth in the original appeal, are not frivolous but in fact are questions of great substance and significance which merits a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.



For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative, the issuance of the mandate of this Court be stayed and the appellant Velez continued on bail pending the filing and disposition of his Petition for a Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted,

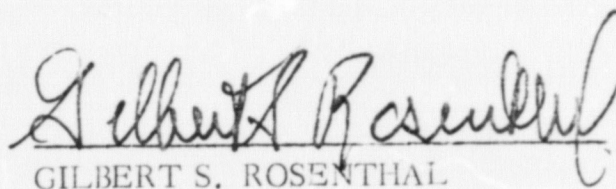
  
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Dated: November 10, 1976

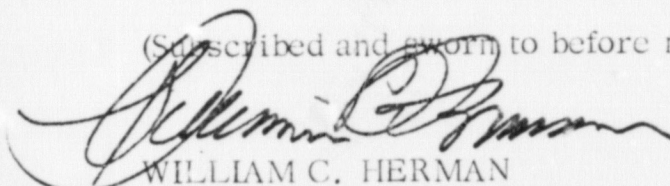
STATE OF NEW YORK )  
                                  ( ss.:  
COUNTY OF NEW YORK)

GILBERT S. ROSENTHAL, being first duly sworn,  
on oath certifies and says:

That he is a member of the firm of Rosenthal & Herman,  
P.C., attorneys for the appellant in this cause; that he makes this  
certificate in compliance with the rules of this Court; that in his  
judgment the within and foregoing petition is well founded and is not  
frivolous or interposed for delay.

  
GILBERT S. ROSENTHAL

(Subscribed and sworn to before me this 10th day of November, 1976)

  
WILLIAM C. HERMAN

Notary Public, State of New York  
No. 60-1770600  
Qualified in Westchester County  
Term Expires March 30, 1977



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

-against-

ALBERT YOUNG,

Petitioner.

SUGGESTION FOR A  
REHEARING EN BANC

Docket No. 76-1113 (1127)

-----X  
The Petitioner, LEON VELEZ, suggests to this Court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard en banc for the following reasons:

1. The issues raised by the petitioner in his petition for a rehearing directly confront the issue of violation of the Fifth Amendment rights of the appellant to a fair trial and Due Process of Law. The importance of this question raised by petitioner in his appeal is of great and general significance.
2. The decision entered by this Court affirming petitioner's conviction came two months after oral argument.
3. The argument to the Court that heard this appeal that the District Judge was ineffective in protecting the rights of appellant Velez and his co-defendants by merely admonishing the prosecutor for his professional misconduct in his summations and failing to impose any sanctions by reason of same, was diminished by the fact that the Court that heard this appeal was composed of one

Circuit Judge and two District Judges.

WHEREFORE, the petitioner, LEON VELEZ,  
respectfully suggests that he be granted a rehearing of the above  
appeal en banc.

Yours, etc.

*Rosenthal & Herman*  
*by Gilbert R. Rosenthal*

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AFFIDAVIT OF PERSONAL SERVICE

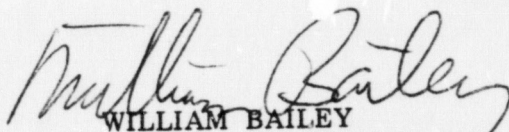
STATE OF NEW YORK  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of November, 1976 at No. 1 St. Andrews Place, NYC

deponent served the within PETITION  
upon UNITED STATES ATTORNEY

the atty. for res. herein, by delivering 2 true  
copy(ies) thereof to him personally. Deponent knew the person so  
served to be the person mentioned and described in said papers as the  
atty. for res. therein.

Sworn to before me this  
11 day of November 1976.

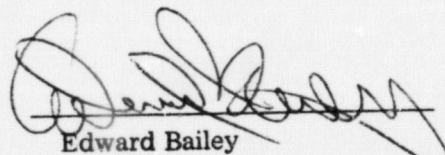
  
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1978

  
Edward Bailey

COPY RECEIVED  
**ROBERT B. FISKE JR.**  
NOV 11 1976  
U. S. ATTORNEY  
SO. DIST. OF N. Y.